Supreme Court, U.S.
FILED
MAY 29 2002
CLERK

No. 01-1632

(2)

In The

SUPREME COURT OF THE UNITED STATES

THE STATE OF TEXAS,
Petitioner

V.

KIMBERLY LAGAYLE MCCARTHY,
Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE JUSTICES OF SAID COURT:

Respondent, Kimberly LaGayle McCarthy, by undersigned counsel, respectfully moves this Court to proceed *in forma pauperis* pursuant to SUP. CT. R. 39. In support of this motion, Respondent would show the following:

1. Respondent was convicted of capital murder in violation of TEX. PENAL CODE ANN. § 19.03(a)(2) (amended 1994). On November 24, 1998, the trial court entered a judgment imposing the death penalty. The Texas Court of Criminal Appeals entered its Opinion reversing the trial court's judgment on December 12, 2001. *See McCarthy v. State*,

17 pp

65 S.W.3d 47 (Tex. Crim. App. 2001). Ms. McCarthy is presently remanded to the Dallas County jail, awaiting retrial.

2. The 292nd Judicial District Court of Dallas County, Texas appointed the undersigned to represent Respondent at trial and on direct appeal to the Texas Court of Criminal Appeals. *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(I)(j) (Vernon Supp. 2001). Prior to Respondent's trial the 292nd Judicial District Court found her to be indigent and appointed the undersigned to represent her free of charge. No court has ever denied Respondent leave to proceed *in forma pauperis*, and Respondent attaches an affidavit of indigence herewith. *See* SUP. CT. R. 39(1). Respondent also attaches hereto a certified statement from the Dallas County Jail, reflecting a balance of $611.10 in her inmate trust account. Respondent hereby moves this Court, pursuant to 28 U.S.C. § 1915 and SUP. CT. R. 39, to allow her to proceed in this cause without payment of fees or costs, and otherwise to proceed as an indigent.

3. Respondent is plainly without adequate funds to pay any part of the fees and costs in this case. She was appointed counsel to represent her at the state trial and appellate levels, and was allowed to proceed as an indigent without payment of fees or costs.

For these reasons, Kimberly LaGayle McCarthy respectfully requests, through undersigned counsel, that the Court grant her leave to proceed *in forma pauperis* in this Court.

Respectfully submitted,

ORIGINAL SIGNED BY
DOUGLAS H. PARKS

DOUGLAS H. PARKS
ATTORNEY AT LAW
3300 OAK LAWN, STE. 600
DALLAS, TEXAS 75219
TEL: (214) 521-2670
FAX: (214) 528-6601

STATE BAR NO. 15520000

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Douglas H. Parks, a member of the Bar of this Court, hereby certify that on the 29th day of May, 2002, a copy of the Motion for Leave to Proceed In Forma Pauperis in the above-entitled case was mailed first class United States mail, postage prepaid, to Edward L. Marshall, Assistant Attorney General, Deputy Chief, Capital Litigation, P. O. Box 12548, Austin, Texas 78711-2548, counsel for Petitioner herein. I further certify that all parties required to be served have been served.

ORIGINAL SIGNED BY
DOUGLAS H. PARKS

DOUGLAS H. PARKS
ATTORNEY AT LAW
3300 OAK LAWN, STE. 600
DALLAS, TEXAS 75219
TEL: (214) 521-2670

STATE BAR NO. 1552000

COUNSEL FOR RESPONDENT

STATE OF TEXAS §
§
COUNTY OF DALLAS §

AFFIDAVIT OF INDIGENCE

I, KIMBERLY LAGAYLE MCCARTHY, #02012661, being presently incarcerated in the Dallas County, Texas jail, swear under penalty of perjury that the following is true and correct:

I depose and say that I am the Respondent in the above-entitled case: that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of this case or to give security therefore; and that I am entitled to redress.

I further declare that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes ___ No ✓
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   _____
   _____
   _____

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.

   July 1997 $10,000.00 yearly
   _____
   _____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of payments, interest, dividends or other sources?

Yes ___ No ✓

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

_____

_____

_____

3. Do you own any cash or checking or savings accounts?

Yes ___ No ✓

a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ___ No ✓

a. If the answer is yes, describe the property and state its approximate value.

_____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

N/A _____

_____

_____

I understand that a false statement or answer to any question in this statutory declaration will subject me to penalties for perjury.

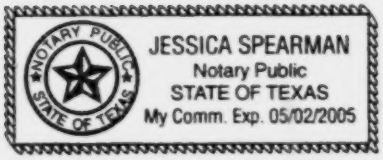
Kimberly LaGayle McCarthy

KIMBERLY LAGAYLE MCCARTHY

Sworn to and subscribed before me on this 28th day of May, 2002.

Jessica Spearman
Notary Public, State of Texas

My commission expires: May 2, 2005



BEST AVAILABLE COPY

RUN DATE 05/29/2002 Dallas County Sheriff's Department
RUN TIME 10:53:05 INMATE TRANSACTIONS

Docket# 00126661
Name MCCARTHY KIMBERLY L
Race B Sex F DOB 05/11/1961
Remarks
Status BI Freeze N Date 05/19/2002 Time 15:20:36
Current Balance 611.10

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ORTHTOW 70 05/24/02 13:11 01151	MCCARTHY KIMBERLY L				

Inmate Signature _____

Marian R. Ogletree

MARIAN R. OGLETREE
Notary Public
STATE OF TEXAS
My Comm. Expires 11-03-2002

No. 01-1632

In The

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,
Petitioner,

v.

KIMBERLY LAGAYLE MCCARTHY,
Respondent.

On Petition For Writ of Certiorari
to the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

Douglas H. Parks
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Dallas, Texas 75219
(214) 521-2670

ATTORNEY FOR RESPONDENT

LIST OF PARTIES

The only parties to this proceeding are listed in the caption.

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REASONS FOR DENYING THE WRIT

I.

NEITHER THE RECORD NOR THE DECISION BELOW PROPERLY RAISE OR ADDRESS THE QUESTIONS PRESENTED BY THE PETITION

Respondent (hereinafter McCarthy) filed a pre-trial motion to suppress the written statement at the center of this controversy. After a hearing on the motion, McCarthy asserted that the statement was inadmissible because she had been questioned by the police, without her attorney being present, after she had unambiguously invoked her right to counsel.

McCarthy argued that the evidence was clear that a law enforcement officer (Detective Bishop) interrogated her after she had invoked her right to counsel and that she had not initiated the contact with Detective Bishop. The State did not respond to McCarthy's argument, or offer any justification for the admission of the statement. The trial court summarily ruled that the statement was admissible and never filed findings of fact and conclusions of law. *See* Petitioner's Appendix A, 4-6.

On direct appeal to the Court of Criminal Appeals of Texas, the State asserted only that the trial court did not err by admitting the statement or, if it did err, that error was harmless. In support of its contention the State argued, essentially, that since McCarthy had spoken with Detective Bishop without having been coerced or badgered, had ultimately waived her right to counsel and given a voluntary statement, *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) did not apply. *See* Petitioner's Appendix C, 13-

18.

The State raised the issues of agency and the public safety exception for the first time in its Motion for Rehearing to the Court of Criminal Appeals. Likewise, the theory that the Fifth Amendment is not implicated when a suspect gives a voluntary statement to a "non-investigating" police officer was raised for the first time in the same motion, which was summarily denied. *See* Petitioner's Appendix B.

The questions now presented in the Petition for Writ of Certiorari violate the rule against this Honorable Court deciding claims "not pressed nor passed upon" in state court. *See State Farm Mutual Automobile Insurance Co. v. Duel,* 324 U.S. 154, 160 (1945); *Hill v. California*, 401 U.S. 797, 805-06 (1971).

The State's reliance upon *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), is grievously misplaced. A fair reading of that case reveals the "not pressed or passed upon" rule applies where there was never "any real contest" upon the point to be decided, even if a general claim of a constitutional violation had been raised at every level of the state judicial system. In *Gates*, the Court requested the parties to address whether the rule requiring exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment should be modified to not require, for example, exclusion of evidence obtained in the reasonable belief that the search and seizure was consistent with the requirements of the Fourth Amendment.

Illinois v. Gates, supra at 213-14. However, after review, the Court declined to decide the

very issue it had requested be addressed. It held that the specific question had not been presented to or decided by the Illinois courts although the respondents had "expressly raised, at every level of the Illinois judicial system, the claim (t)hat the Fourth Amendment had been violated []and[] that the State challenged, at every level of the Illinois court system, respondent's claim that the substantive requirements of the Fourth Amendment had been violated." *Illinois v. Gates, supra*, at 213, 220. However, the State (Petitioner) never raised or addressed the specific question whether the federal exclusionary rule should be modified and none of the state court opinions gave any indication that the question was considered. *Illinois v. Gates, supra*, at 220-21.

McCarthy also relies upon *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed 2d 203 (1997), which stated:

> "With 'very rare exceptions', *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. §1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. See *Heath v. Alabama*, 474 U.S. 82, 87, 106 S.Ct. 433, 436-437, 88 L.Ed.2d 387 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-219, 103 S.Ct. 2317, 2321-2322, 76 L.Ed.2d 527 (1983); *McGoldrick v. Compagnie Generale Transatiantique*, 309 U.S. 430, 434, 60 S.Ct. 670, 672, 84 L.Ed. 849 (1940).

The Court should decline to decide these questions for the reason that Petitioner has not met its burden of showing that the issues were properly presented with "fair precision and in due time." *Adams v. Robertson, supra,* at 87.

II.

THE LOWER COURT'S RULING DOES NOT CONFLICT WITH *EDWARDS V. ARIZONA* OR WITH THE DECISIONS OF OTHER COURTS INTERPRETING *EDWARDS*

The State first suggests that *Edwards v. Arizona* be modified to allow continuing interrogation of suspects, even after they have invoked their right to counsel, so long as any statement given as a result of the continued interrogation was voluntary. That approach was rejected in *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

Likewise, the Court of Criminal Appeals ruling is not in conflict with the cases cited by the State for the proposition that McCarthy reinitiated contact with the police through an agent. There is no evidence to be found in the record that McCarthy's husband was acting as her agent when he sent Detective Bishop to see her. The State concedes in its Petition that there is no direct evidence of such an agency relationship.

The State asks this Court to speculate that her husband was her agent since she may have talked with him before being interrogated by Detective Bishop, or that Detective Bishop acted in good faith based upon the apparent authority of McCarthy's husband, or that McCarthy ratified her husband's apparent authority by giving a voluntary statement. Petitioner cites no authority for any of these "exceptions" to the rule of *Edwards*.

The cases that are cited by Petitioner are clearly distinguishable on the facts and do not amount to the kind of unresolved conflict required for certiorari to be granted.

III.

THE LOWER COURT'S RULING DOES NOT CONFLICT WITH FEDERAL CONSTITUTIONAL LAW REGARDING CONFESSIONS TO FAMILY MEMBERS

Detective Bishop is not a member of McCarthy's family. When he violated her right to be free of further interrogation by law enforcement officers he was a Dallas police detective. He testified, under oath, that he did not go to see McCarthy as her friend or her husband's friend, he went as a police officer. (SR48 - 33; Petitioner's Appendix C, 12).

There is no basis, in fact or law, for Petitioner's assertion that the Court of Criminal Appeals' ruling conflicts with federal constitutional law regarding confessions to family members.

IV.

THE LOWER COURT'S RULING DOES NOT CONFLICT WITH THE PUBLIC SAFETY EXCEPTION OF *NEW YORK V. QUARLES*[1]

The cases cited by Petitioner have no real application to the facts of this case. Detective Bishop was not confronting a suspect concerned with his own safety or that of the public. Here, Detective Bishop was not asking a suspect if she had a gun, as was the situation in the cases cited by Petitioner.

There was no "objective danger" requiring that the rule of *Edwards* be ignored. If

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[1] *New York v. Quarles*, 467 U.S. 649 (1984)

Detective Bishop was truly concerned with what McCarthy's husband was telling him, she should have dealt with him, not reinitiate interrogation of McCarthy.

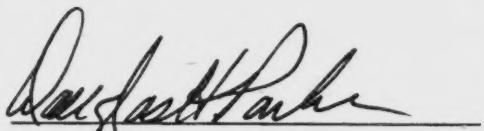
Detective Bishop's sole purpose was to elicit testimonial evidence from McCarthy. He went to interview her as a police officer, not a friend. He removed her to a place in the sheriff's department where he could obtain "Voluntary Statement" forms and read her the Miranda rights. Prior to initiating contact with McCarthy, he obtained information from the Lancaster Police Department to aid him in his interrogation, leaving Sergeant Patrick Stallings, the Lancaster officer in charge of the investigation, with the understanding that he intended to take a statement from McCarthy. (Petitioner's Appendix A, 4-5).

These facts do not give rise to the public safety concerns expressed in *Quarles* and do not amount to the kind of unresolved conflict required for certiorari to be granted.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,



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